

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

FOR MR. CLIFF JUSTICE MARTIN.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

IN THE

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Wm. H. Dodge
Court of Appeals, District of Columbia

OCTOBER TERM, 1926.

—
No. 4405.

289

FRANCESCO LIDONNICI, SEVERIO DESIDERIO, GIOVANNI
CANDIOTI, AND NICOLO FINARO, *Appellants*,

v.

JAMES J. DAVIS, *Secretary of Labor*, AND W. W. HUSBAND,
Commissioner of Immigration, U. S.

—
BRIEF FOR APPELLANTS
—

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v.

JAMES J. DAVIS, *Secretary of Labor*, AND W. W. HUSBAND, *Commissioner of Immigration, U. S.*

BRIEF FOR APPELLANTS

This case is here on appeal from a final order of the Supreme Court of the District of Columbia, entered on the 22d day of May, 1925, overruling appellants' motion to vacate a final decree dismissing the Amended Bill of Complaint, said decree being entered on the 30th day of January, 1925.

Statement of Procedure

On October 25, 1923, appellants filed a Bill of Complaint in the Supreme Court of the District of Colum-

bia praying injunctive relief. An injunction *pendente lite* was awarded appellants by the Supreme Court of the District of Columbia on the 16th day of January, 1925. Appellees filed their Answer to the Bill. Appellants, with leave of Court, on the 26th day of February, 1924, filed a Supplemental Bill strengthening some of the averments made in the original bill. On August 18, 1924, the original and supplemental bills were dismissed on motion of appellees, with leave to appellant to amend.

The order dismissing the original and supplemental bills did not, however, annul the temporary restraining order in force, but by its terms expressly kept the said order in full force and effect.

On September 16, 1924, appellants filed an amended bill of complaint, which was, on the 30th day of January, 1925, on motion of appellees, dismissed by the Court.

Appellants, on the 3d day of February, 1925, filed a motion to vacate the decree of January 30, 1925, which motion, on the 22d day of May, 1925, was overruled and denied. Appellees filed no answer to the amended bill of complaint. It is from this order that appellants have appealed to this Court.

The Motion to Dismiss the amended bill of complaint filed in behalf of appellees is inserted in this brief at this point in full by agreement between counsel for the reason that the same was inadvertently omitted from the Designation of Record.

IN THE
SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

HOLDING AN EQUITY COURT.

FRANCESCO LIDONNICI, SEVERIO DESIDERIO, GIOVANNI CANDIOTI, NICOLO FINARO, v. JAMES J. DAVIS, <i>Secretary of Labor; AND</i> W. W. HUSBAND, <i>Commis-</i> <i>sioner of Immigration of</i> <i>the United States.</i>	}	Equity No. 41,843.
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**MOTION TO DISMISS AMENDED BILL OF
COMPLAINT**

Now come the defendants, James J. Davis, Secretary of Labor, and W. W. Husband, Commissioner of Immigration of the United States, by and through their attorney, Peyton Gordon, United States Attorney in and for the District of Columbia, and move to dismiss the amended bill of complaint filed herein on September 16, 1924, on the following grounds:

(1) That said amended bill of complaint alleges no facts which were not alleged in the original bill of complaint as amended and which was dismissed by this Honorable Court, except facts which are inconsistent with and repugnant to the facts alleged in the original bill of complaint as amended, as follows:

(a) That in the said amended bill of complaint plaintiff alleged that plaintiffs entered the United

States with the intention of going to Laredo, Texas, a port of entry, whereas in the original bill as amended it is alleged that plaintiffs entered the United States with the intention of going to San Antonio, Texas, which is not a port of entry.

(b) That in the amended bill of complaint plaintiffs allege that at the second hearing before the Immigration Inspector at Laredo, Texas, they were denied the right to be represented by counsel, whereas, in the original bill of complaint as amended they allege that they were advised by said Immigration Inspector at said hearing, and by others, that a lawyer would be of no avail to them and that he would take their money and could render them no service, and that said hearing proceeded without counsel for plaintiffs being present.

(c) That in the amended bill of complaint plaintiffs allege that they have never been shown a warrant for their arrest and have never been given an opportunity to make answer to any warrant, whereas, in the original bill of complaint as amended they allege that at said hearing before said Immigrant Inspector the warrant issued on May 15, 1925, for their arrest was read to them.

(2) That the said amended bill of complaint alleges no facts which if true would entitle plaintiffs to the relief prayed.

(3) That the amended and supplemental bill is without equity.

(4) That it affirmatively appears from the said amended bill that the plaintiffs entered the United States at a place other than one designated by the Commissioner of Immigration as a port of entry for aliens, and the said plaintiffs are therefore subject to deportation under the provisions of Section 19 of the Act of Congress approved February 5, 1917, 39 Stats. 874.

(5) That it affirmatively appears from the said amended bill that the plaintiffs entered the United States without inspection and are therefore subject to deportation under the provisions of said Section 19 of said Act of Congress.

(6) That it affirmatively appears from the said amended bill that the plaintiffs had not entered or resided in Mexico more than two years prior to their entry into the United States, and the said amended bill fails to allege that said plaintiffs were brought to Mexico by a transportation company which had submitted to and complied with all of the requirements of said Act of Congress.

(7) That the amended bill fails to allege that the admissible quota of immigrants from Italy, the country of which plaintiffs are natives, was not exhausted at the time of the entry of said plaintiffs, and whether plaintiffs are aliens returning from a temporary visit abroad, and therefore not within the provisions of the Quota Act, is a question of fact to be determined under said Act only by the defendant, the Secretary of Labor, and not by this Court.

(8) That it affirmatively appears from the said amended bill that the defendants herein released the plaintiffs under bonds and that defendants have forfeited said bonds and the said amended bill fails to allege that defendants complied with the terms of the said bonds; therefore said plaintiffs are not in court with clean hands.

(9) That the plaintiffs have an adequate and complete remedy at law by surrendering themselves into the custody of the proper immigration officials and contesting in habeas corpus proceedings the validity of the respective orders of deportation issued by the defendant, the Secretary of Labor.

(10) That the plaintiffs had an adequate and complete remedy at law to prevent forfeiture of their respective bonds by surrendering themselves before the forfeiture of said bonds into the custody of the proper immigration officials and by contesting through habeas corpus proceedings the validity of the respective orders of deportation issued by the Secretary of Labor.

PEYTON GORDON,
United States Attorney.
 VERNON E. WEST,
Assistant United States Attorney.
Attorneys for Defendants.

To: Robert H. McNeil, Esq.,
 Attorney for Plaintiffs.

Please take notice that the foregoing motion will be called for hearing before Mr. Justice Hoehling in Equity Court No. 1 on Friday, Oct. 24, 1924, at 10 o'clock A. M., or as soon thereafter as counsel may be heard.

PEYTON GORDON,
United States Attorney.
 VERNON E. WEST,
Assistant United States Attorney.
Attorneys for Defendants.

The questions presenting themselves for consideration by this Court on appeal are: *Does the Amended Bill of Complaint filed on the 16th day of September, 1924, assuming all material averments therein made as true, state an equitable cause of action? Assuming all material averments of the bill as true, does the case made out entitle the appellants to the relief prayed?*

Statement of Facts

Appellants, on the 13th day of May, 1924, were arrested by immigration officials while on their way to New Laredo, Texas, to report to the proper immigration officials at that place. The arrest took place after their entry into the United States, and upon United States territory. The arrest was made *without a warrant having first issued*. On the 14th day of May, 1923, no warrants having been issued for their arrest or detention, appellants were all arraigned before an Immigration Inspector in Texas and required to show cause why they should remain in the United States. No evidence was offered by the Government as a basis or reason for the deportation of appellants, or any one of them, and appellants, unrepresented by counsel and specifically denied such representation, made their claims to be and remain in the United States because they were and are *residents* of the United States. Thereafter, on the following day, May 15, 1923, telegraphic warrants for their arrest were sought and obtained by the immigration authorities. Appellants never were given a hearing on these warrants, but were released on bonds of \$1,000 each pending consideration of their cases, and, on the 1st day of August, 1923, were ordered deported from the United States "upon a verdict alleged to have been reached on evidence adduced at an alleged hearing on the said warrants, which said hearing appellants say was never held in fact." (Rec. p. 15.) The reasons assigned by the immigration authorities for appellants' deportation are:

1. That they entered the United States at a place other than a designated port of entry for aliens.

2. That they entered at a time when the quota from their native country (Italy) was exhausted.

3. That they were liable to become public charges.

Appellants refused to surrender themselves for deportation and sought relief by filing the original bill in equity herein. Their bonds were attempted to be forfeited by the Department of Labor and appellees were about to deposit said funds in the United States Treasury as forfeited funds, where the same would be beyond the control of the appellants completely, and they would be unable to recover the same, except by special Act of Congress (Rec. p. 16).

The above facts are equally applicable to the case of each of the four appellants.

Counsel will, from the averments of the amended bill of complaint, set forth briefly the salient facts in each of the appellants' cases:

Appellant Francesco Lidonnici

This appellant is an Italian by birth, who immigrated to the United States in the year 1906, remaining here continuously, residing and working during that time at Chester, West Virginia, until the year 1920, in which year he took his wife and family for a visit to his native country, Italy, his intention being at that time to return to the United States within a period of six months. Upon arriving in Italy, he found conditions so demoralizing in the way of business and public affairs generally, and such extensive unemployment, that all laboring people were reduced to circumstances of the utmost hardship; his own family, that is, his parents, being in dire circumstances and suffering in the last stages of poverty. Appellant,

from the resources he had saved and upon which he relied for the return of himself and family to the United States, contributed to the support of his aged parents, consuming in this fashion the entire money he had for his return to this country. He sought employment in Italy in order that he might accrue sufficient funds to bring himself and family back to the United States, and succeeded in saving sufficient for the return of himself in the early part of 1923.

When appellant left the United States in 1920, it was his intention to return to the United States within the period of six months, as above stated, and during the entire time of his stay in Italy he considered the United States as his place of residence and permanent domicile, to which country he always expected to return. Prior to his leaving the United States, appellant was registered in the military service of the United States, and during the entire tenure of such registration he stood ready and willing to serve in the Army of the United States.

In the year 1914 appellant married his present wife in Hancock County, State of West Virginia, and there were born to him and his wife, *in the United States*, four children, all of whom are in Italy and desirous of coming to the United States, their fatherland, at such time as their father may be able to procure the necessary money to bring them here.

During the lapse of time between the years 1906 and 1920, appellant was employed by and worked for one employer, the American Sheet and Tin Plate Company, at Chester, West Virginia (Rec. pp. 11-12).

In April, 1923, having accumulated sufficient funds for his return passage to the United States, appellant made arrangements for his transportation and learned

that the passage to New York was much higher than he had anticipated and the passage to Cuba much more reasonable. He decided, as a temporary matter, to sail for Cuba, relying upon information received from steamship officials that work was plentiful there, and he could work and save sufficient to take him on to the United States, his ultimate destination. Upon his arrival in Cuba, after two days of most diligent and unsuccessful search for employment, he embarked for Mexico, relying upon information he had received in Cuba that he would find work there, it being his intention still to work and procure funds to bring him on to his ultimate destination, the United States. Arriving in Mexico, he found a great deal of unrest and very little employment, so engaged passage, with one believed by him to be a bona fide carrier of passengers for hire, to New Laredo, Texas, it being his intention upon arriving in New Laredo, Texas, to seek out the proper immigration officers and to make known to them that he was a resident of the United States, returning from abroad to an unrelinquished domicile here. Shortly after his arrival in the United States and while on his way to New Laredo, Texas, he was arrested by immigration officers and caused to make a statement with respect to his right to be and remain in the United States. Appellant fully informed the immigration officers that he had lived in the United States continuously from the year 1906 to 1920; that he had four children born to him in the United States; that he departed from the United States in 1920 for the purpose of making a temporary visit to his aged parents in Italy; that during the entire time he was abroad he regarded the United States as his fixed and permanent domicile and always had the intention of

returning to the United States as soon as he could raise the necessary money therefor, and detailed to the immigration authorities the reasons for his protracted stay in Italy and the conditions and circumstances surrounding that stay.

Appellant Severio Desiderio

This appellant is also an Italian by birth. He immigrated to the United States in the year 1901 and resided here continuously until 1903, at Pittsburgh, in the State of Pennsylvania, returning, in the latter part of that year, to Italy for a visit, and subsequently returning to the United States, his unrelinquished domicile, in 1904. In 1909 he again returned to Italy for a visit and returned to this country in 1913, remaining here until 1920, when he once more visited Italy. He visited Italy on this last occasion because of information which he had received as to the very serious financial difficulties through which his aged parents were passing. Upon arrival in Italy, he found conditions extremely bad and people, generally, suffering from lack of earning capacity. In a short time, his entire funds had become exhausted in the upkeep of himself and his aged family. Prior to his leaving for Italy, he had been registered in the draft for service in the United States Army, and during the entire period of said registration he stood ready and willing to serve in the army of the United States. At all times since the year 1901 he has considered the United States as the place of his permanent abode and domicile; that on each visit to Italy and during the tenure of each visit it was always his intention to return to the United States, which country he regarded as his domicile.

Appellant left Italy for return to the United States

at the same time and on the same boat with the appellant Lidonnici, and visited the same ports and under the same conditions, arriving in the United States through Texas with said appellant Lidonnici.

Appellant Giovanni Candiotti

This appellant came to the United States in the year 1905 and resided here for about three and a half years, returning to Italy for a short visit, later returning to the United States to a domicile which he had retained and had not relinquished, and remained in the United States continuously until the year 1914, when he visited Italy for the purpose of being married to his present wife. Immediately upon his marriage in Italy, war broke out between France, England and Germany, and other European countries, and the Government of Italy, because of said war, refused to permit appellant to return to the United States with his wife, but required him to remain in Italy until, in the year 1916, the Government of Italy entered the European conflict, and appellant became a member of the Italian Army, with which he served during the entire period of the war and from which he was honorably discharged. At the time appellant left the United States in 1914 he did so with the intention of marrying and returning to the United States within six months; that at the time of his departure from the United States and at all times while absent therefrom he considered the United States as his place of domicile and ever and always expected and intended to return to the United States at such time as he could be free to do so.

This appellant returned to the United States on the same boat with appellants Lidonnici and Desiderio, visited the same ports, under the same conditions and circumstances.

Appellant Nicolo Finaro

This appellant in 1915 went to Italy from the United States for the purpose of paying a visit to his friends and relatives. Prior to his leaving the United States in 1915, he had been for more than seven years a resident of the United States and had considered said country as his place of domicile and intended to return thereto at the end of said visit. Arriving in Italy, however, he was almost immediately drafted into the military service of that country, where he served throughout the war, receiving at the close thereof an honorable discharge therefrom.

This appellant also returned to the United States on the same boat, visited the same ports, under the same conditions and circumstances as did appellants Lidonici, Desederio and Candioti. ,

Law Points and Argument**I****APPELLANTS HAVE NEVER BEEN AFFORDED
A HEARING, AS PROVIDED BY THE IM-
MIGRATION LAWS AND RULES.**

All of these aliens were arrested *after having entered* the United States. They were arrested on United States territory. Their cases must, therefore, be governed by the Immigration Laws and Rules applicable to persons *already within* the United States, whom the authorities believe to be, for reason, subject to deportation.

The Immigration Rules of February 1, 1924, which are in this respect the same as the Rules and Law of 1917, declare the procedure which is proper in such case. Rule 18, Subdivision A, Paragraph 1, provides:

“Officers shall make a thorough investigation of all cases when they are credibly informed or have reason to believe that a specified alien in the United States is subject to arrest and deportation on warrant.”

Having made such investigation, Subdivision B, of the same Rule, directs that, before the arrest of the alien, an application be made for a warrant of arrest, and “the application must state facts showing prima facie that the alien comes within one or more of the classes subject to deportation after entry, and, excepting cases in which the burden of proof is upon the alien involved, should be accompanied by some substantial supporting evidence.”

Upon receipt of a warrant of arrest by the Inspector, Subdivision D of this Rule provides for a hearing upon the warrant—

“upon receipt of a telegram or written warrant of arrest the alien shall be taken before the person or persons therein named or described and granted a hearing to enable him to show cause, if any there be, why he should not be deported. Pending determination of the case, in the discretion of the immigration officer in charge, he may be taken into custody * * *.”

The kind of hearing to be so afforded the alien is characterized in paragraphs 2 and 3 of Subdivision D of the same Rule as follows:

“PAR. 2.—At the hearing under the warrant of arrest the alien shall be allowed to inspect the warrant of arrest and shall be apprised that he may be represented by counsel. The alien shall be required then and there to state whether he de-

sires counsel or waives the same, and his reply shall be entered on the record. If counsel be selected, he shall be permitted to be present during the conduct of the hearing and to offer evidence to meet any evidence presented or adduced by the Government. Objections of counsel shall be entered on the record, but the reasons for such objections shall be presented in accompanying brief. If during the hearing it shall appear to the examining inspector that there exists a reason additional to those stated in the warrant of arrest why the alien in the country in violation of law, the alien shall be notified that such additional charge will be placed against him, and he shall be given an opportunity to show cause why he should not be deported therefor.”

“PAR. 3.—At the close of the hearing the full record shall be forwarded to the bureau, together with any written argument submitted by counsel and the findings and conclusions of the examining officer and the recommendations of the officer in charge, for decision of the Secretary of Labor as to whether or not a deportation warrant shall issue.”

Let us now examine the averments of the bill of complaint and ascertain the kind of hearing these appellants were in fact afforded:

“After they had arrived in the United States, but not upon their arrival in the said United States—while they were yet upon their journey to New Laredo, Texas—they were arrested by the immigration officials of the United States without warrant * * * and arraigned before an immigration inspector at New Laredo, Texas, for a hearing; that at the said hearing they were not represented by counsel, but specifically denied the right to be so represented; that at the said hearing, so held, they explained to the immigration in-

spector as aforesaid that they were residents of the United States, returning to the United States after a temporary visit abroad, and that they considered the United States at the time of their departure and at all times during their absence and now at the time of their return their legal domicile and place of residence; that following the said hearing they were held and detained by said immigration officials at New Laredo, Texas, without warrant for a further period of three days, and they were again arraigned before the said inspector and again denied the right to be represented by counsel; that they have never been shown a warrant for their arrest and have never been given an opportunity to make answer to any warrant, although they are informed by counsel that such warrants were issued three days after their arrest as aforesaid, and that the Government seeks to deport them upon a verdict alleged to have been reached on evidence adduced at an alleged hearing on the said warrants, which said hearing complainants say was never held in fact.” (Rec. pp. 14-15.)

These averments are all facts and assumed as true for the purpose of this appeal, the same being from a decree sustaining a Motion to Dismiss.

It is respectfully suggested that the procedure followed by the immigration officials, as set out in these averments of the amended Bill of Complaint, be read with the law and rules as above quoted, for conclusive proof of appellants' first complaint and grounds for the relief asked.

What really happened is—the aliens were seized *without a warrant, when actually in the United States*, and, at a so-called hearing, before the United States immigration officials, required to make statements, on which statements, adduced from them at a time when

they were denied the right of legal representation, warrants for their arrest were obtained, they being held in custody until the arrival of the warrants.

They were required to testify against themselves and on that testimony alone a warrant for their arrest was asked and obtained.

II

AS RESIDENTS OF THE UNITED STATES FOR A PERIOD, OF SEVEN (7) CONSECUTIVE YEARS, APPELLANTS WERE ENTITLED TO BE AND REMAIN IN THE UNITED STATES.

From the averments of the amended bill of complaint, all four of these appellants resided in the United States for seven (7) consecutive years next preceding their departure for Italy for a temporary visit.

Lidonnici resided here from 1906 to 1920, working continuously during that time for the American Sheet and Tin Plate Company at Chester, West Virginia. He married in the United States and had born to him in the United States four (4) children, all of whom are, of course, citizens of the United States. He left the United States in 1920 with intent to return here within six (6) months. He was delayed because of circumstances absolutely beyond his control, but never, during his stay in Italy, did he, at any time, relinquish his domicile or residence in the United States (Rec. pp. 11-12).

Desiderio resided in the United States for seven years, at intervals prior to 1913, and continuously from 1913 to 1920. He left here for Italy in 1920 for a short visit (Rec. p. 12).

Candioti resided here from 1906 to 1914, except for a short visit, in the interim, to Italy. He left the United States in 1914 for a visit to Italy for the purpose of marrying. He intended, upon his departure, to return to the United States with his bride, but was denied the right so to return by the Government of Italy because of imminent fear of war. He served Italy during the period of the world war, but never, at any time, did he relinquish his desire or intent to return to his unrelinquished domicile in the United States (Rec. p. 13).

Finaro resided in the United States for seven (7) consecutive years prior to 1915, departing for Italy in that year for a short visit. He was, upon his arrival in Italy, drafted into the Italian Army, and served in that army during the entire period of the world war (Rec. p. 13).

All of the facts as above with respect to former residence in the United States were made known to the immigration officials. Appellants claimed the right to residence in the United States, because of such prior residence. (Rec. p. 15.)

Paragraph 1, of Subdivision A, Rule 12, of the Immigration Rules of February 1, 1924, which are substantially the same as the Rules of 1917, provides:

“Under the seventh proviso of section 3 of the Act of February, 1917, aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Secretary of Labor, and under such conditions as he may prescribe. In such case satisfactory proof of domicile in the United States for seven consecutive years, and of departure therefrom with the intention of returning thereto, will be exacted. Every

case of exclusion for any cause, in which the alien has given such proof, shall be promptly brought by the immigration official in charge to the attention of the Secretary of Labor, through the usual official channels, with a complete report of the reasons for the alien's exclusion and of the proof which has been offered of continuous and unrelinquished domicile, together with a statement of the duration of absence."

These appellants all made known to the immigration authorities that they had resided in the United States for seven consecutive years (Rec. p. 15), and claimed the right to remain in the United States as persons who had returned to an unrelinquished United States domicile, and appellees "without consideration of their said claim to an unrelinquished domicile in this country and without giving complainants opportunity to be heard thereon, are threatening to cause each of the complainants to be deported from the United States to Italy, thereby disregarding the claims of your complainants to a right to return to this country, their legal domicile, which domicile they did not relinquish when they last returned to Italy, and to which country the defendants now wish them to return for permanent legal residence, without consideration of complainants' rights as residents of the United States (Rec. p. 17).

Appellees have entirely ignored Rule 12 of the Laws of 1924, as above set out. They not only have failed to exact *proof* of unrelinquished domicile of these appellants, but have in fact denied them the right to give such proof.

Paragraph 1, Subdivision G, Rules of February 1, 1924, provides, *en toto*:

“A temporary visit abroad as used in subdivision (d) of section 2 of said act of May, 1921, as amended, shall be construed to mean an absence in any foreign country without relinquishment of domicile for a period not exceeding six months. An alien remaining abroad more than six months shall be presumed to have abandoned his domicile in the United States, and the burden shall be upon such alien to establish to the satisfaction of the appropriate immigration officer that he has not relinquished such domicile.”

The burden to establish, on proof, an unrelinquished domicile is on the appellants here, they having remained abroad a greater period than six months, but how can they carry that burden to the satisfaction of the immigration officials if they are denied the opportunity of a hearing so to do?

Such an opportunity has been denied these appellants:

“Your appellants further show that they have never been given a proper or legal hearing of their rights to remain in this country of this unrelinquished domicile; that they have never had the services of counsel in any hearing granted to them or have they ever been given full opportunity with the assistance of counsel to show the facts to the Department of Labor as to their previous residence in this country and of their desire to return to it because of their claim of unrelinquished domicile therein, but notwithstanding this, your complainants say that the defendants herein insist upon having them immediately surrender themselves for deportation without giving them the benefit of making proof of the facts herein stated.” (R. p. 17.)

III**APPELLANTS CLAIMED TO DEPARTMENT OF
LABOR OFFICERS THEIR RIGHT TO RE-
MAIN IN THE UNITED STATES AS RESI-
DENTS THEREOF, RETURNING TO AN UN-
RELINQUISHED DOMICILE (Rec. p. 15).**

It is the duty of the authorities to determine, in the first instance, whether or not appellants are residents of the United States, returning to an unrelinquished domicile. This was never done. Appellants' claims were ignored absolutely.

The Commissioner of Immigration, "although knowing and having before him the facts uncontradicted in their nature, establishing the fact that complainants, all and several, had heretofore resided for a period of more than seven consecutive years in the United States and absented themselves from this country with intent to return thereto within the period of six months and had never relinquished their domicile in the United States, and had good and sufficient reasons for their delay in so returning to the United States, utterly failed to consider their status as residents of the United States and ordered them deported without consideration of their rights under the immigration laws and acts to return to the United States after a reasonable period of absence abroad of a temporary nature, which said act of said Commissioner of Immigration in so failing to give proper consideration to complainants' cases and the subsequent order of deportation without consideration thereof, complainants state is an autocratic act of discretionary authority, in utter violation of the immigration laws under the law of the United States." (Rec. p. 16.)

The failure of appellees to decide appellants' status as residents of the United States is in and of itself sufficient ground to restrain them from deporting appellants.

Appellants made claim to be and to remain in the United States as aliens returning to an unrelinquished domicile. Appellees disregarded this claim. They did not decide it either favorably nor unfavorably (Rec. pp. 16-17). They ordered appellants deported not because they were not residents of the United States for seven consecutive years and not because they had remained abroad a greater period than six months, and not because the Secretary of Labor, in the exercise of his discretion, found that they had relinquished their domicile because of their stay abroad, but without first considering or deciding these issues, properly before them, raised by appellants, ordered appellants deported because:

“1. They entered the United States at a port other than a designated port of entry for aliens.

“2. Because they entered the United States at a time when the quota for aliens from Italy was exhausted.

“3. Because they were likely to become public charges.” (Rec. p. 16).

That the failure of appellees to pass upon the claims of appellants to domicile in this country and the right to remain here because of that unrelinquished domicile, and the ordering of them deported without determining their claims, is error suffice to restrain appellees from executing the order of deportation issued by them herein is clear from the case of *Robert D. Tod, Commissioner of Immigration, v. Szejwa Waldman, et al.*, No. 95, October Term, 1924, Supreme Court

of the U. S. That case, in principle, is the same as the instant case. In that case, the immigrant Waldman, on her arrival in the United States, claimed admission as a matter of right under the law as one fleeing from religious persecution in her native land. The immigration authorities ordered her deported, not because of a finding that she was not so fleeing from religious persecution, but because, without determining this point, they were unable to find said immigrant able to pass the educational test and likely to become a public charge. The court held that the findings of the Board, as above, created a variance between the evidence and the said findings and did not afford to the said immigrant a proper hearing for that the issues raised by them and the point upon which they relied for their entrance into the United States had not been decided by the Commissioner of Immigration. The court said:

“We concur with the Circuit Court of Appeals in its criticism of the record in this case in that it does not set out more fully the details of the test applied in the examinations. *The record is defective also in not showing the definite rulings of The Commissioner or the Board of Inquiry on the issues made by Mrs. Waldeman in her evidence. This made clear her claim that she and her children were refugees from religious persecution, relieving her from an educational test; but no finding appears in the record on this point, either by the Board or the Department on appeal.* The mere implication that the claim must have been passed on adversely to her because the language test was applied is not enough. *If the necessary findings was in fact made, it should be made part of the record.* We agree with the Circuit Court of Appeals also that the absence from the record of any finding by the Department on appeal as to

the issue whether the lameness of Zenia, one of the children, affected her ability to earn a living or made her likely to become a public charge is a defect. The inquiry and finding should have been made. If made, the record should disclose it. If not made, the inquiry should be made and the finding recorded."

So, in the case at bar, the record is defective in not Showing a definite ruling of the Commissioner of the Board of Inquiry on the issues made by these appellants.

These issues made clear their claims that they were persons returning to an unrelinquished domicile in the United States after a temporary stay abroad, the duration of which stay was due to circumstances beyond their control, and appellants, in paragraphs 10 and 12 of their amended bill of complaint (Rec. pp. 16-17), affirmatively state that this claim to be and remain in the United States as residents thereof, returning to an unrelinquished domicile, was made to immigration authorities, but was not passed upon by the Commissioner or his subordinates. The reasons assigned by the appellees for the deportation of appellants are also set out in the amended bill of complaint, paragraph 9 (Rec. p. 16). There is no finding on the part of appellees or their subordinates on the issues made by appellants. It has never been determined by them whether or not appellants are residents of the United States returning to an unrelinquished United States domicile. If the necessary finding, using the words of the Supreme Court of the United States, through Mr. Chief Justice Taft, in the case above cited, was in fact made, it should be made a part of the record.

Appellants in the Bill of Complaint aver that such a finding was not made and that no finding on this question was made on the Department's record. This averment is assumed as true, this appeal being from a Motion to Dismiss.

It is therefore respectfully submitted that by reason of this variance alone these appellants are entitled to have the order of deportation herein issued as set out in the amended bill of complaint declared void and the bonds heretofore collected of them, as averred in the amended bill of complaint, refunded to them or their lawfully constituted attorneys in fact.

IV

IF APPELLANTS ARE, IN FACT, RESIDENTS OF THE UNITED STATES, RETURNING TO AN UNRELINQUISHED DOMICILE, THE REASONS ASSIGNED BY THE DEPARTMENT FOR THE DEPORTATION OF APPELLANTS ARE NOT APPLICABLE.

a. Aliens returning to an unrelinquished domicile in the United States may enter at any port, whether a port of entry designated by the immigration authorities for the admission of aliens or not.

Section 8 of the Act of February, 1917, which said act is incorporated verbatim in the Immigration Laws and Rules of February 1, 1924, at sub-section F, in division 1 of division C, reads as follows:

“(1) Any person, including master * • • of any vessel, bringing into or landing in United States by vessel or otherwise, or attempting by himself or through another to land in the United States, or concealing or harboring or attempting

to conceal or harbor, or assisting or abetting another to conceal or harbor in any place • • • *any alien not duly admitted by immigrant inspector or not lawfully entitled to enter or reside within the United States under terms of the act of February, 1917*, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine not exceeding \$2,000 and by imprisonment for a term not exceeding five years for each alien so landed or attempted to be landed or brought in."

A careful analysis of this section of the act clearly shows that there are some persons whom it is not a crime to bring into the United States at ports other than designated ports of entry; some persons who cannot therefore be smuggled into the United States; some persons who have a right to be in the United States and enter at any port or place they choose, whether designated by the Commissioner of Immigration as a port of entry or not. Those persons lawfully entitled to enter under the act of February, 1917, are set forth in the same Immigration Laws of February, 1924, which embody said Act, commencing at page 10, subdivision 2 of the said Act, reading "Excepted Classes not excluded," as contradistinguished from the subdivision next preceding it—subdivision 1, reading "Classes generally excluded." Under subdivision "b" of the aforesaid section, designated "Excepted Classes not excluded," as persons lawfully entitled to be in the United States, we find "Aliens returning to unrelinquished United States domicile." So that we say that these appellants, if in fact "aliens returning to unrelinquished United States domicile," and the question has not been determined against them by the Secretary of Labor, but has rather been affirm-

atively established by a *prima facie* case made out in their behalf before the Immigration Inspector in Texas, when they were *unrepresented by counsel*, as well as in the amended bill of complaint, are entitled to enter the United States, and may enter the United States as set out in the foregoing section F, at any port, either a port of entry designated for admission of aliens or otherwise, and are not subject to the Quota Act nor to that provision relative to becoming "public charges," and that the findings made by the Secretary of Labor are, at least, until an affirmative decision has been made and written finding in the record to the effect that they are not *aliens returning to an unrelinquished domicile*, not applicable in the case of these appellants.

b. Aliens returning to an unrelinquished United States domicile are not subject to the Quota Act.

In the Rules of February 1, 1924, which incorporate Section 3 of the Act of February 5, 1917, it is provided in Paragraph 2 on page 15, under the general heading of "Excepted Classes Not Excluded," and the more specific heading "Persons exempt but who shall be counted in reckoning quota":

"Aliens of the following classes, if otherwise admissible, may be admitted notwithstanding the maximum quota has been reached. * * *

1. Aliens returning from a temporary visit abroad."

It is quite clear, therefore, that if the appellants are aliens returning to the United States from a "temporary visit abroad," the fact that the quota of the country they were visiting is exhausted is no reason, under the Law and Rules, to deport them.

c. Aliens returning to an unrelinquished United States domicile are not subject to the Act relative to those likely to become public charges, and cannot be deported for that reason.

In the same Law and Rules as above quoted, under the same heading in Section J of subdivision 1 on page 12, it is provided that

“any alien liable to be excluded because likely to become a public charge * * * may, if otherwise admissible, be admitted, in the discretion of the Secretary of Labor, upon giving bond approved by the Secretary in such amount and containing such conditions as he may prescribe to the United States and to all States, Territories, counties, towns, municipalities and districts thereof holding the United States * * * harmless against such alien becoming a public charge.”

We therefore say that this assigned ground for deportation is wholly insufficient. From the very averments of the amended bill itself, appellants each put up \$1,000 in cash as bail, through their friends, and it is reasonable and just to assume and say could have put up the small bond required by this section.

In short, the reasons for deportation assigned as above by the Department of Labor are wholly inapplicable, if these appellants are, in fact, aliens returning to an unrelinquished United States domicile, and this point, in violation of justice and equity, and the Rules and Laws of the Immigration Department itself, has not been determined.

It is clear that appellants have been wronged and that they seek their remedy.

V

HAVE APPELLANTS A COMPLETE AND ADE-
QUATE REMEDY AT LAW?

At the time of the filing of the original bill herein, appellants had on file with the Department of Labor bonds in the penal sum of \$1,000 each. The Department of Labor had ordered appellants deported arbitrarily as hereinabove set out, without determining their claim to remain in the United States as aliens returning to an unrelinquished domicile. They had gone further and had ordered that appellants' bondsmen turn over to the Department of Labor in cash the money represented by their bonds. Appellees had held this money and were about to deposit the same in the United States Treasury as forfeited funds. Appellants had no remedy at law at all to prevent this forfeiture. The funds, once in the United States Treasury, would be beyond the reach of appellants in any action at law. An Act of Congress alone, obtained after a delayed period, would be their only hope. Law afforded no remedy to restrain this forfeiture. An injunction in equity is the only relief and appellants sought and obtained the same. The injunction or restraining order so obtained is still in force. The decree dismissing the original bill of complaint provides that it shall remain in force.

Appellants were not in custody at the time of the filing of the original bill of complaint, but were at large under bond. They could not, therefore, have employed a writ of habeas corpus to prevent their deportation. It is true that during the pendency of this suit they were arrested in violation of the injunction restraining deportation and were required to give further bonds to appear for deportation if so ordered.

They are now under bonds in the State of Pennsylvania. A writ of habeas corpus would not lie purely for the purposes of determining a man's rights when he is not in fact deprived of his liberty. It is a well-established principle of law that where parties are out on bail and voluntarily surrender themselves for the purpose of obtaining a writ of habeas corpus for their release that the writ shall not be granted. This principle is so established on the theory that habeas corpus is intended for the relief of those who are involuntarily and illegally held and not for the benefit of those who voluntarily surrender themselves to arrest and detention. Detention must be genuine and forced and not voluntary and elected. This law is especially emphasized in the State of Pennsylvania, where appellants all resided and where they are now under bond and where they would have to surrender themselves, if at all, for the purpose of a writ of habeas corpus. Under the decisions of Pennsylvania, if these defendants were to now surrender themselves to the Pennsylvania authorities and were to then ask release on habeas corpus, such release would be denied them upon the principle stated, and they would in all probability be immediately deported to Italy. Should they be surrendered by their bondsmen, at their instance, the same principle would apply, unless the surrender by their bondsmen was absolutely involuntary on the part of appellants, and against their protest. The Pennsylvania decisions on the above points are clear, the leading case possibly being *Commonwealth v. Green*, 185 Pa. 641; 40 Atl. 96, wherein the court says:

“* * * that on April 7, 1898, the defendant
with same sureties entered into recognizance
* * * conditioned to be and appear at the

courts * * * when required; that thereafter and until April 28, so far as appears, the defendant was in the enjoyment of his liberty, at which time he voluntarily surrendered himself into the custody of the sheriff, and presented his petitions to this court for a habeas corpus and certiorari as ancillary thereto.

“During the twenty days that elapsed, it does not appear that any application was made for the correction of any errors in the proceeding * * * without availing himself of that regular, legitimate and ordinary means of redress, he by his own act deprived himself of his liberty *and made a case that was supposed* to require the direct intervention of this court. It required neither argument nor citation of authority to show that such practice is *essentially* bad and should not be encouraged.”

To a like effect are the following cases:

Commonwealth ex rel Reeder v. Tenicle, 20 Pa. Co. Ct. 68; 150 Cal. 663; 136 Minn. 331; 139 Cal. 342.

If appellants had employed a writ of habeas corpus, they could not possibly have restrained the Labor Department from turning their money into the Treasury of the United States as forfeited funds. To obtain such a result they would, of necessity, have had to institute a second suit. The law clearly is that in order to avoid a multiplicity of suits, one may join a cause praying legal relief with a cause growing out of the same transaction and subject-matter, praying equitable relief, and pursue the same in a Court of Equity.

Appellants contend in their amended bill of complaint that the action of the Secretary of Labor, and of the Commissioner of Immigration, in ordering them

deported without a fair determination of their rights, is an autocratic exercise of that discretionary authority vested in them under the Immigration Laws, which authority or discretion, appellants complain in their bill, these two officials have autocratically and arbitrarily exercised. It is fundamental in law and equity that where discretionary authority on the part of a Government official has been arbitrarily and wantonly exercised a court of equity will review the decision of the Government official and grant the complainant relief against such arbitrary exercise of authority.

It is respectfully submitted that the decree of the lower court directing that the amended bill of complaint herein be dismissed should be reversed, and appellees required to answer.

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